

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an arrangement between HarperCollins Publishers L.L.C., Hachette Book Group Inc., Verlagsgruppe Georg von Holtzbrinck GMBH, Holtzbrinck Publishers, LLC d/b/a Macmillan, Simon & Schuster Inc. and Apple Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 90.1 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

AND

**HARPERCOLLINS PUBLISHERS L.L.C., and
HARPERCOLLINS CANADA LIMITED**

Respondents

**RESPONSE OF THE COMMISSIONER OF COMPETITION
(Motion to Strike / Dismiss the Application)**

I. OVERVIEW

1. HarperCollins Publishers L.L.C. (“**HarperCollins**”) and HarperCollins Canada Limited (“**HarperCollins Canada**”) seek an order dismissing the Commissioner of Competition’s (the “**Commissioner**”) Application in this matter. HarperCollins asserts that:

- i. the Competition Tribunal (the “**Tribunal**”) lacks jurisdiction to grant the relief sought by the Commissioner given that the Arrangement which underpins the Application was formed in the United States; and
 - ii. there is no “existing or proposed” arrangement in relation to the sale of E-books at retail in Canada, as is required by s. 90.1 of the *Competition Act* (the “**Act**”).
2. The Tribunal has the requisite jurisdiction to grant the order the Commissioner has sought. The fact that the Arrangement was arrived at in the United States is not determinative of the Tribunal’s jurisdiction under s. 90.1 of the Act. The Arrangement generally, and HarperCollins and HarperCollins Canada in particular, have a real and substantial connection to Canada. That connection provides the Tribunal with jurisdiction in this matter. Moreover, the Arrangement continues to exist in Canada.
3. For purposes of this motion, the Commissioner relies on the facts as pled in the Application and Reply. Capitalized terms used herein are as defined in the Application and Reply.

II. THE TRIBUNAL’S JURISDICTION - REAL AND SUBSTANTIAL CONNECTION

4. There is a real and substantial connection between Canada and the Arrangement generally and HarperCollins Canada/HarperCollins in particular. That connection grounds the Tribunal’s jurisdiction in this matter.
5. A real and substantial connection exists as a result of, among other things, the fact that:
 - (a) HarperCollins and the Other US Publishers always contemplated that the Arrangement would be implemented in Canada and, either directly or through an affiliate, implemented the Arrangement in Canada; and

(b) the Arrangement causes harm in the market for the retail sale of E-books in Canada.

6. The fact, as asserted by the Respondents, that there is a legal presumption against extra-territorial application of Canadian law does not negate the real and substantial connection between Canada and the Arrangement generally, and between Canada and HarperCollins and HarperCollins Canada in particular.
7. The Respondents assert without explanation that when s. 90.1 of the Act is interpreted in the context of other provisions of the Act including ss. 45, 46 and 83, it is clear that the reach of s. 90.1 is limited to agreements and arrangements entered into in Canada. The Commissioner disagrees.

(a) The Arrangement Contemplated Canada and was Implemented in Canada

8. As detailed in paragraphs 11 and 12 of the Application, HarperCollins and the Other US Publishers all carry on business in Canada, either directly or through subsidiaries or affiliates.
9. HarperCollins describes itself as the second largest consumer book publisher in the world and consisting of a number of entities, including HarperCollins Canada. HarperCollins Canada is a Canadian corporation and is also a wholly-owned subsidiary of News Corporation. In addition to being responsible for the HarperCollins' Canadian publishing program, HarperCollins Canada is responsible for the sales, marketing and publicity of HarperCollins' titles in Canada.
10. From the time that discussions between Apple Inc. ("Apple") and HarperCollins and the Other US Publishers began in mid-December 2009, it was clear that they contemplated that the Arrangement would apply to both the United States and Canada.
11. As set out in paragraphs 72 – 77 of the Application, these communications include:

- i. an internal HarperCollins email circulated among senior executives following its meeting with Apple on December 16, 2009 referencing Apple's iPad launch and, in terms of sequencing, indicating: "Phase I launch will be in the US and Canada; Phase II will be in 23 other countries including the UK and ANZ";
- ii. minutes from a HarperCollins' Executive Committee Meeting held on December 21, 2009, which indicate in respect of Apple's entry into the E-book market:
 - Apple
 - Met with all publishers confidentially. "Entering eBook business." Will accommodate enhanced ebooks, \$15.99 price. Providing terms this week.
 - ...
 - US and Canada immediately, Europe slightly later. ...;
- iii. a March 5, 2010 email from HarperCollins's SVP, Digital Business Development, to HarperCollins Canada's CEO and SVP Digital, with the subject "Agency Roll-Out in Canada" stating:

FYI: We heard this week from both Amazon and Apple that they won't be ready to roll out agency in Canada at the same time that they roll out in the US, so we've adjusted our contracts with all agents ... to address the sales of the HC-US catalog into the US only.

We're assuming we can roll out agency in Canada once the legal due diligence has been done and Apple is ready to lead the charge.

- iv. a series of emails sent by Apple to HarperCollins and the Other US Publishers on March 24, 2010, which in part indicated:

Like me, I'm sure you're focused intently on the US launch right now. However, I was wondering if you have time (...) to spend 15 minutes talking about pricing and other issues re: Canada. I want to be able to move quickly after the US launch to follow with Canada.

12. Consistent with the foregoing, the fact that Canada was always intended to be covered by the Arrangement was manifested in the draft agency agreements that Apple circulated to HarperCollins and the Other US Publishers on January 11, 2010, as well as the US Agency Agreements executed by HarperCollins and the Other US Publishers in late January 2010, which included Canada as part of the “Territory” covered by those agreements.
13. In addition, on April 22, 2010, Apple sent draft agency agreements for Canada to HarperCollins and the Other US Publishers. On May 11, 2010, Apple sent another round of draft agency agreements for Canada to, among others, HarperCollins, Macmillan and S&S, with the message: “you spoke and we listened. Here’s the new version of the Canada deal.” By May 17, 2010, Apple had also sent terms of the proposed Canadian agency agreement to Hachette. Apple’s draft agreements for Canada incorporated by reference the key substantive terms of the US Agency Agreements, including the MFN provision.
14. In Canada, the Arrangement was operationalized by agency agreements entered into by HarperCollins and the Other US Publishers, either directly or through their affiliates, with Canadian E-book retailers. HarperCollins Canada, Hachette Digital Inc. and S&S Canada signed agency agreements with Apple Canada in June 2010, shortly before the July 1, 2010 launch of iBookstore.ca. Between July 1, 2010 and November 2011, each of HarperCollins Canada, Hachette Digital Inc., S&S Canada and Macmillan entered into agency agreements with Canadian E-book retailers such that by November 2011 all of them had agency agreements with Apple Canada, Kobo and Amazon.
15. While it took more time to transform the market from wholesale to agency in Canada than the United States as a result of certain operational issues, HarperCollins, Apple and the Other US Publishers never wavered from their decision to bring about that transformation.

(b) The Arrangement Causes Harm in the Market for the Retail Sale of E-books in Canada

i. *The Arrangement Provides for a Market Structure which is Inherently Anti-Competitive*

16. As a result of the Arrangement, the Canadian retail market for E-books shifted to the Agency Model, which included uniform pricing across all retailers for any given E-book covered by the relevant agency agreements and a prohibition against retailer discounting. Before the implementation of the Arrangement in Canada, the retail E-books market had been marked by vigorous competition among retailers; however, after implementation, retail price competition was and remains thwarted.
17. Through its amazon.ca website, Amazon has continued to this day to offer Canadian consumers significant discounts on print books to attract consumers from rival retailers. But for the Arrangement, E-books would have continued to have been sold in Canada under the wholesale model (as print books are to this day) and price competition in the relevant market for E-books in Canada would have continued and would exist today.

ii. *E-book Prices in Canada have Increased Substantially as a Result of the Arrangement and Agency Implementation*

18. As a result of the shift from wholesale to agency in Canada, retail prices for E-books sold by HarperCollins Canada, S&S Canada, Macmillan and Hachette/Hachette Digital increased substantially over what they had been under the wholesale model. These average increases measure from 6% to 33%, on a quantity weighted basis. In respect of HarperCollins Canada, in particular, the move from wholesale to agency in Canada led to average increases in the Canadian retail prices of its E-books that measure from 18% to 32%, on a quantity weighted basis.
19. In their Response, HarperCollins and HarperCollins Canada deny the Commissioner's allegation that E-book prices have been substantially elevated as a result of the Agency Model. However they maintain that even if E-book prices did rise under the Agency

Model, that would be an insufficient basis for finding an SPLC in view of certain benefits they argue flowed from the adoption of the Agency Model.

20. Though prices of HarperCollins' and the Other US Publishers' E-books sold in Canada have varied since the implementation of the Agency Model in Canada, they remain substantially higher today than would have been the case but for the Arrangement and the resulting shift from wholesale to agency.

III. THE ARRANGEMENT IS "EXISTING"

21. The Arrangement existed on the date the Application was filed and continues to exist in Canada to this date.
22. The US Judgments did not apply to the sale of E-books in Canada, so have no bearing on the existence of the Arrangement in Canada.
23. The 2014 Consent Agreement was stayed before being implemented and was ultimately rescinded and therefore had no impact on the existence of the Arrangement in Canada or on competition in the retail E-books market in Canada.
24. The 2017 Consent Agreements were stayed before being implemented and therefore had had no impact on the existence of the Arrangement in Canada or on competition in the retail E-books market in Canada.

IV. CONCLUSION

25. The Tribunal has jurisdiction to grant the relief requested in the Application.
26. It is not plain and obvious that the Application cannot succeed because it is bereft of any chance of success.

27. The Respondents' motion should be dismissed, with costs.
28. *Competition Act*, R.S.C. 1985, c. C-34, as amended, section 90.1.
29. *Competition Tribunal Act*, R.S.C. 1985, c.19 (2nd Supp.), sections 8, 8.1, 9(2).
30. *Competition Tribunal Rules*, SOR/2008-141, Rules 5, 34, 85.
31. *Federal Courts Rules*, SOR/98-106, Rule 221.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. the pleadings and proceedings regarding E-books before the Tribunal, the Federal Court and in the United States, all on the public record, including materials appended to the affidavit of Marilyn Nelson, sworn March 21, 2017, and filed in this proceeding;
2. the affidavit of Amani Syed, affirmed March 28, 2017; and
3. such further and other evidence as counsel may submit and the Tribunal consider.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Gatineau, Quebec,

this 28th day of March, 2017.



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